63 pp

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

43pp

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that Wyoming be granted leave to file its Fourth Cross-Claim against the United States, which seeks relief under the North Platte Decree based on allegations that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing use of water from those reservoirs.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

On October 6, 1986, the State of Nebraska petitioned this Court to adjudicate its claims under the North Platte Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953). The Court granted Nebraska leave to file its petition, 479 U.S. 1051 (1987), and referred the matter to Special Master Owen Olpin, 483 U.S. 1002 (1987). The Special Master filed his First and Second Interim Reports, 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992), which addressed various pretrial issues. This Court overruled the affected States' exceptions to those reports. 113 S. Ct. 1689 (1993). The Court has since referred to the Special Master motions by those States to amend their pleadings. 114 S. Ct. 1290

(1994). On September 9, 1994, the Special Master submitted his Third Interim Report addressing those motions. The Court has invited the parties to file exceptions to the Special Master's Third Interim Report. 115 S. Ct. 308 (1994).

A. The Original Proceedings

In 1934, the State of Nebraska brought an original action in this Court against the State of Wyoming, seeking an equitable apportionment of the North Platte River. See *Nebraska* v. *Wyoming*, 325 U.S. at 591. In the course of the next 11 years, the State of Colorado was impleaded as a defendant, the United States intervened, Special Master Michael Doherty was appointed to take evidence, and (after a lengthy investigation) he issued a report. This Court reviewed the 274-page Doherty Report and largely followed its recommendations. See *id.* at 616-617.

The Court's 1945 decision focused on the immediate problem at hand: the North Platte's flow was overappropriated, and water users in Wyoming and Colorado were depleting the water supply before it reached downstream users in Nebraska. The Court perceived a clear need for an interstate apportionment of available water based on principles compatible with state water law systems. 325 U.S. at 616-617. As the Court explained, under the state law doctrine of prior appropriation, "priority of appropriation gives superiority of right." *Id.* at 617. The Court concluded that this "priority rule" should be the "guiding principle" in ensuring that available water is fairly allocated among the States. *Id.* at 618. The Court also noted, however, that a "just and equitable" apportionment might require departures from that principle. *Ibid.*

The Court was well aware that the apportionment controversy was "a delicate one and extremely complex." 325 U.S. at 617. It attempted to provide a workable solution to the practical problem by formulating a decree to "deal with conditions as they obtain today." *Id.* at 620. The Court observed that if conditions "substantially change, the decree can be adjusted to meet the new conditions." *Ibid.* Mindful that the North Platte Basin was experiencing a drought, the Court also concluded that its apportionment should be based on the "dependable flow." *Ibid.* "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." *Ibid.*, quoting *Wyoming* v. *Colorado*, 259 U.S. 419, 476 (1922).

Having stated those principles, the Court applied them to sequential sections of the North Platte River, from its source in Colorado to the Nebraska-Wyoming border. 325 U.S. at 621-655; see *id.* at 593-607 (describing the "natural sections" of the river). For each section, the Court examined Special Master Doherty's detailed inventory of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. The Court basically concluded that established priorities should be protected from any material increase in diversions that pose a concrete threat to the water supply. But the Court declined to prohibit alleged harms that were speculative, concluding that appropriate relief would be available if the threat materializes and "promises to disturb the delicate balance of the river." *Id.* at 625. See also *id.* at 622-623, 626-627, 628-629, 632-633, 637, 654, 655, 657.

Broadly viewed, the Court's decision had three prominent features. First, it allowed Colorado and

Wyoming water users on the upper reaches of the North Platte River (from its source to Pathfinder Reservoir) to continue existing diversions, while prohibiting certain new diversions that would diminish downstream water supplies. See 325 U.S. at 621-625. Second, the decision established priorities among federal storage reservoirs and certain canals that supply water for irrigation during the growing season. *Id.* at 625-637.[1] Third, the decision provided a proportional allocation of the North Platte River's natural flow from Whalen Dam near the confluence of the North Platte and Laramie Rivers in Wyoming to the Tri-State Dam, just across the border in Nebraska. *Id.* at 637-654.[2]

The Court directed the parties to formulate a decree "to carry this opinion into effect." 325 U.S. at 657. The resulting North Platte Decree contains a series of injunctions that, in accordance with the Court's decision, impose specific prohibitions on water diversions that pose an actual or impending threat to established uses. See Decree ¶¶ I-V (325 U.S. at 665-669).[3] The Decree also contains other definitional and

---

[1] Generally speaking, certain Nebraska canals that predated the Bureau of Reclamation's North Platte and Kendrick Projects have the most senior rights. 325 U.S. at 625-626, 630-631. The North Platte Project's Pathfinder and Guernsey Reservoirs, which store water primarily for Nebraska irrigation districts, have seniority over the subsequently constructed Kendrick Project's Seminoe and Alcova Reservoirs, which store water primarily for Wyoming irrigation districts. *Id.* at 626, 632-633.

[2] The Court apportioned 75% of the irrigation season natural flow to Nebraska and 25% to Wyoming, based on a rough proportion of the respective States' irrigation requirements and relative priorities in that reach. See 325 U.S. at 640-646.

[3] The Decree generally follows the structure of the Court's opinion, imposing prohibitions beginning at the headwaters of the North Platte River and extending to the Wyoming-Nebraska

administrative provisions. See Decree ¶¶ VI-XV (325 U.S. at 669-672). Paragraph XIII, the so-called "re-opener" provision, is particularly important. In keeping with the Court's decision to postpone resolution of abstract conflicts until they pose a concrete problem, paragraph XIII provides that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief." *Id.* at 671-672.[4]

B. The Current Proceedings

In 1986, Nebraska invoked paragraph XIII of the Decree for an order enforcing the decree and for injunctive relief. See First Interim Rep. 2 & n.1; Second Interim Rep. 4. Nebraska contended that Wyoming has violated Nebraska's rights under the Decree through actions or proposed actions that would deprive Nebraska of water. Wyoming admitted the actions alleged in

---

border. Thus, paragraph I of the Decree enjoins Colorado from diverting or storing water in excess of prescribed amounts from the source of the North Platte River to the Colorado-Wyoming border. 325 U.S. at 665. Paragraph II enjoins Wyoming from diverting or storing water in excess of prescribed amounts from the Colorado-Wyoming border to Guernsey Reservoir. *Id.* at 665-666. Paragraphs III and IV establish priorities among the Nebraska canals, the North Platte Project reservoirs, and the Kendrick Project reservoirs, which divert water at various points for the most part in Wyoming. *Id.* at 666-667. Paragraph V apportions the natural flow from the Guernsey Reservoir to the Tri-State Dam, located in Nebraska near the Wyoming border. *Id.* at 667-669.

[4] In 1953, this Court approved a stipulation by the parties to amend the Decree to take into account the Bureau of Reclamation's construction and operation of the Glendo Unit of the Pick-Sloan Missouri Basin Program. See 345 U.S. 981. The Decree, as modified, appears in the appendix to Special Master Olpin's Third Interim Report at C1-C11.

Nebraska's petition, but denied that those actions violated the Decree, and it also filed a counterclaim against Nebraska. This Court referred the matter to Special Master Olpin, together with several requests for intervention by private parties. See Second Interim Rep. 5-7.

1. *The First and Second Interim Reports*

The Special Master has supervised pretrial proceedings and discovery aimed at narrowing and defining the issues. His First Interim Report recommended denial of Wyoming's comprehensive motion for summary judgment, but left open "the possibility of summary adjudication on any issue later in the proceedings." First Interim Rep. 16, 17-18; see *id.* at 18-37.[5] His Second Interim Report contained his recommendations on the parties' subsequent motions for summary judgment on four central issues in the case: (1) the Inland Lakes dispute; (2) the Laramie River dispute; (3) the Deer Creek dispute; and (4) the "below Tri-State" issues. See Second Interim Rep. 16-19; see also *id.* at 109-110 (proposed order). This Court largely accepted those recommendations and overruled exceptions by the affected States. 113 S. Ct. 1689 (1993).[6]

a. The Inland Lakes dispute. The Court first ruled that Nebraska and the United States were entitled to summary judgment on the Inland Lakes issue. The

[5] The Special Master also denied the pending motions by private parties for intervention, but gave those parties liberal opportunity to participate as amici curiae. See First Interim Rep. 6-14.

[6] The Special Master also recommended against granting the private parties' renewed motions for intervention. Second Interim Rep. 101-109. Those parties did not file exceptions to that recommendation. See 113 S. Ct. at 1694.

Inland Lakes are Bureau of Reclamation reservoirs located in Nebraska. They are part of the Bureau's North Platte Project and serve Nebraska irrigators. During the non-irrigation season, the Bureau diverts North Platte water at the Whalen Dam, located in Wyoming, to the Inland Lakes by way of the Interstate Canal. Nebraska argued that Wyoming was interfering with the Bureau's water deliveries to the Inland Lakes. The Court agreed with the Special Master that the Court's 1945 decision in this litigation had recognized the Inland Lakes storage rights and that the Lakes are entitled to continue receiving water deliveries with the same priority date as other components of the North Platte Project. See 113 S. Ct. at 1696-1697.

b. The Laramie River dispute. The Court next denied Nebraska's and Wyoming's competing motions for summary judgment on the Laramie River issues. The Laramie River is a North Platte tributary that originates in Colorado and flows into the Whalen-to-Tri-State section of the North Platte River. Nebraska argued that Wyoming had authorized storage and diversion facilities on the Laramie River that would deplete that stream's contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. The Court agreed with the Special Master that the 1945 decree "did not decide the fate of the excess Laramie waters," and it concluded that Nebraska could obtain injunctive relief only if it produced evidence that Wyoming's actions pose "a threat of injury serious enough to warrant modification of the decree." 113 S. Ct. at 1697-1699.

c. The Deer Creek dispute. The Court also denied Wyoming's motion for summary judgment on the Deer Creek dispute. Deer Creek is a North Platte tributary that originates in central Wyoming and flows into the

Pathfinder-to-Guernsey section of the North Platte River. Wyoming's proposed Deer Creek Project would result in the construction of a reservoir on Deer Creek to store and divert water for various uses. Nebraska argued that the project would deplete the Deer Creek contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. The Court ruled that the dispute raised issues of material fact concerning the project's character and administration that precluded entry of summary judgment. 113 S. Ct. at 1699-1700.

d. The "below Tri-State" issues. The Court granted Nebraska partial summary judgment on the "below Tri-State" issues. The Tri-State Dam, located about one mile east of the Wyoming-Nebraska border, marks the end of the Whalen-to-Tri-State section of the North Platte River. As we have explained (see page 4 & note 2, *supra*), this Court apportioned the natural flow in that section during the irrigation season, granting 75% to Nebraska and 25% to Wyoming. The Court did not impose an apportionment of the North Platte River downstream of the Tri-State Dam, because it appeared that other sources, including return flows from North Platte irrigation diversions, would provide sufficient water to meet the needs in the downstream section. See 325 U.S. at 654-655. Nebraska contended in the proceedings below that it has a legal entitlement to use of those return flows, because the Decree was premised on their availability. Colorado and Wyoming responded that the Decree protects only Nebraska's right to divert specific amounts of water upstream of the Tri-State Dam. The Special Master concluded that full resolution of the "below Tri-State" issues required further factual development. He recommended, however, that the Court grant partial summary judgment to Nebraska to clarify

that Nebraska is entitled to 75% of the natural flow in the Whalen-to-Tri-State section without regard to the beneficial use requirements of the individual canals. The Court agreed with that recommendation. See 113 S. Ct. at 1700-1701.

2. *The Third Interim Report*

Following this Court's 1993 decision, Nebraska and Wyoming requested leave from the Court to amend their pleadings, and the Court referred those requests to the Special Master. See 114 S. Ct. 1290 (1994). The Special Master's Third Interim Report contains his recommendations. The Special Master recommended that the Court allow Nebraska and Wyoming each to proceed with three of their general claims pertaining to the enforcement and modification of the North Platte Decree. The Special Master recommended against allowance of two claims—one proposed by Nebraska and one proposed by Wyoming. See Third Interim Rep. 33-36. See generally Third Interim Rep. App. D1-D16 (reprinting Nebraska's proposed amended petition); *id.* at E1-E13 (reprinting Wyoming's proposed amended counterclaims and cross-claims).

a. The Nebraska Claims. The Special Master recommended that the Court allow Nebraska to replace its current petition with Counts I through III of its proposed amended petition. See Third Interim Rep. 36-47. Those counts encompass the disputes that were left unresolved by this Court's 1993 decision, as well as additional issues involving other North Platte tributaries, groundwater depletion, water measurement, and the operation of federal reservoirs.

Count I of Nebraska's proposed amended petition seeks to enjoin "the State of Wyoming from increasing its depletion of the natural flows of the North Platte River

in violation of the State of Nebraska's apportionment under the Decree." Third Interim Rep. App. D7. That Count reasserts and expands upon Nebraska's allegations in its original petition. Nebraska not only asserts that Wyoming has violated the existing Decree through proposed development of North Platte tributaries (such as Deer Creek), but also asserts violations based on groundwater development and failure to maintain proper records. See *id.* at D4-D5. Count I specifically asserts that Wyoming has violated Nebraska's rights "by such projects as the proposed Deer Creek Project, reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District, and by permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries." *Id.* at D5. See Third Interim Rep. 36-43.

Count II of Nebraska's proposed amended petition seeks to enjoin "the United States from violating the State of Nebraska's apportionment under the Decree." Third Interim Rep. App. D8. That Count has no corollary in Nebraska's original petition. It arises under Paragraph XVII of the North Platte Decree, which the parties added by stipulation in 1953 specifically to address the operation of the proposed Glendo Reservoir. See note 4, *supra*. Nebraska alleges that the United States has violated Paragraph XVII "by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir." *Id.* at D7. Although the United States denies that its Glendo contracting practices violate the Decree, the United States has not objected to including

that issue (which may be resolved by stipulation) in this proceeding. See Third Interim Rep. 43-44.[7]

Count III of Nebraska's proposed amended petition asks this Court to modify the existing Decree by specifying "that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the Guernsey Dam to Tri-State Dam reach." Third Interim Rep. App. D11. That Count also seeks to enjoin "the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement." *Id.* at D11-D12. Count III is an expanded version of Nebraska's original Laramie River claim. See Third Interim Rep. 44-47.

The Special Master recommended that the Court exclude without prejudice Count IV of Nebraska's proposed amended petition, which asks this Court to "equitably apportion the unapportioned non-irrigation season flows of the North Platte River between Nebraska and Wyoming." Third Interim Rep. App. D15. The Master noted that "the examination during trial of concrete non-irrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the non-irrigation season." Third Interim Rep. 49. He suggested that an apportionment of non-irrigation season flows may ultimately be necessary, but he concluded that such an apportionment, which would be an extremely complex

---

[7] Wyoming also has raised a challenge under Paragraph XVII of the North Platte Decree to the United States' operation of the Glendo Reservoir. See p. 13, *infra*.

undertaking, should not be undertaken until the other claims are resolved. See *id.* at 47-55.

b. The Wyoming Claims. The Special Master recommended that the Court deny Wyoming's request to amend its current counterclaim by adding the proposed First Counterclaim against Nebraska and the proposed First Cross-Claim against the United States. Third Interim Rep. 55-64. Those proposed amendments seek to modify the existing Decree to confirm "that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam" and to limit certain water diversions to Nebraska "in excess of the diversion limits or annual volumetric limitations fixed in Paragraph IV of the Decree." Third Interim Rep. App. E6, E10. The Special Master explained that Wyoming's proposal, which seeks to transform the 1945 equitable apportionment "from a proportionate sharing of the natural flows into a defined and quantified apportionment," would "require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion." Third Interim Rep. 55.[8]

The Special Master recommended, however, that Wyoming be allowed to replace its current counterclaim with the Second through Fourth Counterclaims and the Second through Fifth Cross-Claims contained in its proposed amended filing. See Third Interim Rep. 64-71. The counterclaims (which seek relief against Nebraska) and the cross-claims (which seek relief against the

[8] The Special Master noted, however, that "denial should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments," provided that Wyoming does not attempt to "relitigate the basic apportionment formula that was settled in 1945." Third Interim Rep. 63, 64.

United States and in some instances Colorado) address three subjects. Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims seek enforcement or modification of Paragraph XVII of the North Platte Decree, which the parties added in 1953 to address the Bureau of Reclamation's operations at Glendo Reservoir. See *id.* at 64-65.[9] Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek to revise the procedure set forth in Paragraph V of the North Platte Decree for determining "carriage" losses. *Id.* at 65-67. Finally, Wyoming's Fourth Cross-Claim "states a claim solely against the United States for alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs." *Id.* at 67-71.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Special Master's Third Interim Report proposes that this Court allow Nebraska and Wyoming to revise their pleadings to allow litigation of specific disputes and emerging concerns within the North Platte Basin, including issues of tributary development, groundwater depletion, reservoir operation, water measurement, and carriage losses. The Special Master concluded that "the alleged problems caused by changed conditions on the North Platte, and especially by increasing demands from a greater array of interests, have greatly magnified the complexities of the controversies" and require an expansion of the scope of issues considered beyond "those considered between 1934 and 1945 and even those specifically spelled out in the 1986 and 1987 pleadings." Third Interim Rep. 8.

---

[9] Paragraph XVII of the North Platte Decree is also the subject of Nebraska's proposed Count II. See p. 10, *supra*.

The Special Master's recommended pleading amendments provide an acceptable framework for resolving the current disputes, save in one important respect. The United States excepts to the Special Master's recommendation that Wyoming be granted leave to file its Fourth Cross-Claim against the United States, which seeks relief under the North Platte Decree based on allegations that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing water use from those reservoirs. Wyoming's challenge to the Bureau of Reclamation's administration of storage water is an inappropriate matter in this proceeding for three related reasons.

First, the North Platte Decree grants Wyoming no right to challenge the federal government's administration of storage water. To the contrary, the Decree expressly states that "[s]torage water shall not be affected by this decree," Decree ¶ VI, "nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities," Decree ¶ XII(b). See Third Interim Rep. App. C6, C7. Wyoming's challenge to the Bureau's administration of storage water in this proceeding would manifestly "affect" storage water and "interfere" with the operation of federal water storage facilities. That result is inconsistent with the express terms and intent of the Decree, which leaves in place the established institutions and mechanisms for resolving disputes over administration of federal storage water.

Second, Wyoming is not an appropriate party to challenge the federal government's administration of storage water. The Bureau of Reclamation stores water in federal reclamation reservoirs for release in accord-

ance with its contractual commitments to reclamation project participants and other water users. Wyoming is not a party to those contracts and has no rights under the Decree or otherwise to water stored in federal reservoirs for private water users. The project participants and other contracting parties, who possess legally enforceable contractual rights to the water, are the real parties in interest with respect to the administration of North Platte Project storage water contracts, and they are not parties to this proceeding.

Third, Congress has expressly provided other judicial mechanisms to adjudicate claims by appropriate parties that the federal government has, as Wyoming alleges, "failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs." Third Interim Rep. App. E11. Indeed, a North Platte Project irrigation district has brought a challenge to the Bureau's practices in administering storage water; that case has been briefed and submitted, and it is awaiting decision. See *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo.). See App., *infra*, 1a-8a (reproducing Complaint). This Court should not exercise its original jurisdiction to displace fully adequate mechanisms for resolving conflicts among the Bureau, the reclamation project participants, and other water contractors.

ARGUMENT

WYOMING'S PROPOSED FOURTH CROSS-CLAIM DOES NOT PRESENT AN APPROPRIATE CLAIM FOR RELIEF IN THIS ORIGINAL ACTION

The Constitution grants this Court original jurisdiction over cases in which "a State shall be Party." Art. III, § 2, Cl. 2. Congress has conferred on this Court "original but not exclusive jurisdiction" over controversies between a State and the United States. 28 U.S.C. 1251(b)(2). The Court has exercised its non-exclusive original jurisdiction "sparingly," because claims within that grant of jurisdiction may frequently be pursued through an alternative federal judicial forum. See *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *California* v. *Nevada*, 447 U.S. 125 (1980). See generally R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 469-471, 475 n.17 (7th ed. 1993).

For example, in *United States* v. *Nevada*, *supra*, the Court declined to exercise its original jurisdiction to resolve the respective water rights of California, Nevada, and an Indian tribe, noting that a Nevada district court currently had jurisdiction over water uses in Nevada, 412 U.S. at 537-538, and that "[a]ny possible dispute with California with respect to United States water uses in that State can be settled in the lower federal courts in California," *id.* at 539-540. Similarly, in *California* v. *Nevada*, *supra*, the Court declined to expand its reference to a Special Master in an interstate boundary dispute to resolve borderland title and ownership issues that "typically will involve only one or the other State and the United States, or perhaps

various citizens of those States." 447 U.S. at 133. Instead, the Court explained, "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain." *Ibid.*[10]

The principles that this Court applied in *United States* v. *Nevada*, *supra*, and *California* v. *Nevada*, *supra*, are fully applicable to Wyoming's Fourth Cross-Claim, which seeks relief under the North Platte Decree solely against the United States. Wyoming's claim—which alleges that the federal government has administered water stored in federal reservoirs in violation of federal and state laws and contractual agreements—founders on three basic points. First, the North Platte Decree expressly provides Wyoming no right to "affect" storage

[10] The Court has applied a similar approach to its other exercises of original jurisdiction. For example, Congress has conferred on this Court "original and exclusive" jurisdiction over controversies between two or more States. 28 U.S.C. 1251(a). The Court has construed the grant of exclusive jurisdiction under Section 1251(a) as "obligatory only in appropriate cases," explaining that the question whether a case is "appropriate" requires consideration of "the nature of the interest of the complaining State" and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 113 S. Ct. 549, 552-553 (1992). See, *e.g.*, *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 798 (1992); *Texas* v. *New Mexico*, 462 U.S. 554, 570-571 (1983); *California* v. *Texas*, 457 U.S. 164, 168 (1982) (per curiam); *California* v. *West Virginia*, 454 U.S. 1027 (1981); *Maryland* v. *Louisiana*, 451 U.S. 725, 739-740 (1981); *Arizona* v. *New Mexico*, 425 U.S. 794, 797-798 (1976) (per curiam). See also *Wyoming* v. *Oklahoma*, 112 S. Ct. at 810-812 (Thomas, J., dissenting). The Court is likewise reluctant to exercise its non-exclusive original jurisdiction over suits brought by a State against citizens of another State (28 U.S.C. 1251(b)(3)) if an alternative federal or state forum is available. See *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493 (1971).

water or "in any way interfere with" the operation of federal water storage facilities. Decree ¶¶ VI, XII(b). See Third Interim Rep. App. C6, C7. Second, Wyoming has no contractual or other legal right to the storage water at issue, which is governed by water storage contracts between the Bureau of Reclamation and the water users. And third, any objections that those water users may have to the Bureau's water allocation practices may be litigated in federal district court. See, *e.g.*, *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo.).

A. The North Platte Decree Explicitly Provides That The Decree Shall Not Affect Water Storage Rights Or In Any Way Interfere With The Operation of Federal Water Storage Facilities

Wyoming's Fourth Cross-Claim rests on a fundamental misunderstanding of the North Platte Decree. Wyoming argues that the equitable apportionment contained in that Decree "was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs." Third Interim Rep. App. E11. Wyoming contends that the United States has not adhered to those laws and contracts and that Wyoming may therefore obtain relief under the Decree. See *id.* at E11-E12. Wyoming specifically requests the Court to (1) "declare that the United States' allocation procedure is contrary to the equitable apportionment"; (2) "enjoin the United States' continuing violations of federal and state law"; and (3) "direct the United States to comply with the terms of its contracts." *Id.* at E12. The North

Platte Decree does not provide a basis for granting that relief in this forum.

The North Platte Decree was carefully crafted to preserve the established system for allocation of storage water, including the existing mechanisms for resolution of disputes between the Bureau of Reclamation, project participants, and water contractors. That intention is clear from the terms of the Decree. Paragraph VI states:

> This Decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

Nebraska v. *Wyoming*, 325 U.S. 589, 669 (1945), modified, 345 U.S. 981 (1953); see Third Interim Rep. App. C6. Moreover, paragraph XII(b) states that the Decree shall not affect

> [s]uch claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

325 U.S. at 671; see Third Interim Rep. App. C7. Those provisions indicate that Wyoming cannot invoke the Decree to challenge how the Bureau administers storage water. The Decree expressly leaves the administration of federal storage water, including the resolution of particular contractual disputes, to established institutions and mechanisms that existed prior to the North

Platte Decree and that are independently available to the affected parties.[11]

The Court's 1945 decision, which provided the basis for the North Platte Decree, leaves no doubt that the Court intended that disputes over storage water administration would be resolved through those institutions and mechanisms. The Court specifically recognized that water stored in federal reservoirs is subject to distribution under the federal reclamation laws. 325 U.S. at 611-616, 628-629. The Court placed restrictions on storage of water in the Pathfinder, Guernsey, Seminoe, and Alcova Reservoirs to protect senior canals, *id.* at 630, but the Court made clear that "storage water should be left for distribution in accordance with the contracts which govern it," *id.* at 631.[12]

This Court considered the availability of storage water in deciding upon a formula for equitable apportionment of the North Platte River in the pivotal Whalen-to-Tri-State reach of the river, but it did so in a far more limited sense than Wyoming suggests. See 325 U.S. at 638-646. The Court rejected at the outset Wyoming's

---

[11] The parties amended the Decree by stipulation in 1953 to make one limited exception to that principle. The parties added Paragraph XVII to address the Bureau's operation of the proposed Glendo Reservoir. Both Nebraska and Wyoming have raised specific challenges in this proceeding to Bureau practices under Paragraph XVII. See pp. 10, 13, *supra*. Those Glendo claims are not part of Wyoming's Fourth Cross-Claim.

[12] Indeed, the Court formulated a definition of "storage water" in the Decree specifically to preserve the rights provided by outstanding water contracts. See 325 U.S. at 631; *id.* at 670 (Decree ¶ XI(b)); Third Interim Rep. App. C7. It also declined to include provisions in the Decree that were inconsistent with—or were made unnecessary by—existing Bureau contracts. See 325 U.S. at 632-633. The Court additionally recognized that future contracts might alter the Bureau's obligations. See 325 U.S. at 632.

contention that the Court should apportion storage water. *Id.* at 638-640. The Court explained:

> Certainly an apportionment of storage water would disrupt the system of water administration which has become established pursuant to mandate of Congress in § 8 of the Reclamation Act [43 U.S.C. 372] that the Secretary of the Interior in the construction of these federal projects should proceed in conformity with state law. In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act [43 U.S.C. 523-525] canals. It appears that under that system of administration of storage water no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use.

Id. at 639-640. The Court sought to preserve the established storage water administration system to ensure that water contractors are not "deprived of the use of a part of the storage supply for which they pay." *Id.* at 640. The Court accordingly elected to apportion only the natural flow of the river, see *id.* at 640, 642, explaining that it would take into account "the effects of storage" only as a factor bearing on its choice of an appropriate basis for apportionment, *id.* at 640.

The Court applied that principle in selecting among the proposed apportionment formulas. 325 U.S. at 640-646. The Special Master recommended apportionment through a flat percentage of daily natural flow—75% to Nebraska and 25% to Wyoming—that was based on a rough proportion of the respective States' irrigation requirements and relative priorities in the Whalen-to-Tri-State reach of the river. *Id.* at 640-642. By contrast, Wyoming proposed that Nebraska receive a "mass

allocation" (705,000 acre feet) based on Nebraska's estimated beneficial use, *id.* at 642, while the United States and Nebraska urged an apportionment based either on "strict priority" or through a "block allocation" system that combined both priority and percentage allocation features, *id.* at 643-644.

After comparing those alternatives, the Court decided to adopt the Special Master's flat percentage system. The Court took "account" of storage water, but only in a very limited respect. 325 U.S. at 645. The Court explained the relevance of storage water as follows:

> As we have said, storage water, though not apportioned, may be taken into account in determining each State's equitable share of the natural flow. *Wyoming* v. *Colorado*, *supra* [259 U.S. 419 (1922)]. Our problem is not to determine what allocation would be equitable among the canals in Nebraska or among those in Wyoming. That is a problem of internal administration for each of the States. Our problem involves only an appraisal of the equities between the claimants whom Wyoming represents on the one hand and those represented by Nebraska on the other. We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section as compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master.

Ibid. Thus, the Court considered the availability of storage water only as one of several general factors bearing on the relative equities among the States, and it refused to delve into questions of how water would be allocated among particular users, which were questions of "internal administration." *Ibid.* The Court should

adhere to that approach here and decline to provide a forum in this proceeding for litigating claims concerning specific allocations and deliveries of storage water.[13]

Special Master Olpin recommended allowance of Wyoming's Fourth Cross-Claim on the rationale that "Wyoming's position is not unlike Nebraska's position in attempting to prevent depletions of Horse Creek flows into the mainstem below Tri-State Dam." Third Interim Rep. 70 n.170. The two claims, however, present a fundamentally different situation with respect to the exercise of original jurisdiction. Nebraska's Horse Creek claim presents a bona fide dispute with Wyoming over whether the North Platte Decree gives Nebraska an entitlement to the allegedly depleted flows. The dispute between those two States over the interpretation and application of the Decree cannot be resolved in any other forum. See *id.* at 41-43. By contrast, Wyoming's Fourth Cross-Claim against the United States does not seek to interpret, apply, or modify any provision of the North Platte Decree. Instead, Wyoming seeks to enforce legal and contractual rights that exist entirely apart from the Court's Decree in this case. Indeed, as we explain below, Wyoming is not a real party in interest

---

[13] Indeed, the allegations contained in Wyoming's Fourth Cross-Claim are strikingly similar to the arguments that Wyoming made—and the Court rejected—in the earlier proceedings (including Wyoming's request for an apportionment of storage water). See Exceptions of Defendant, The State of Wy ing, to the Report of Michael J. Doherty, Special Master, No. 6 Orig. (O.T. 1944) at 16, 17-18; Brief of Defendant, State of Wyoming, No. 6 Orig. (O.T. 1944) at 47-57. Wyoming argued then, as now, that Nebraska water users were receiving excessive quantities of storage water in violation of the reclamation laws. The Court declined to resolve those claims. See 325 U.S. at 640 (denying Wyoming's request for an apportionment of storage water).

with respect to those legal and contractual rights, and the real parties in interest may obtain adjudication of their rights in other federal judicial fora.

B. Wyoming Is Not An Appropriate Party To Seek Enforcement Of Legal And Contractual Rights With Respect To The Bureau Of Reclamation's Administration Of Storage Water

Wyoming's Fourth Cross-Claim should be disallowed for the additional reason that Wyoming is not the appropriate party to challenge the federal government's allocation of storage water. As this Court recognized in its 1945 decision, the Bureau of Reclamation is obligated to distribute project storage water in accordance with specific contracts between the Bureau, project participants, and other water users. See, *e.g.*, 325 U.S. at 631, 632-633, 639-640. Those entities have a direct interest in ensuring that the Bureau adheres to the water contracts and the relevant provisions of federal and state law. They—and not Wyoming—are the real parties in interest in any dispute over the allocation of storage water. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."). See also *United States* v. *Minnesota*, 270 U.S. 181, 193-195 (1926).

Wyoming has contended that it is acting in its sovereign capacity to protect its equitable apportionment. That sovereign interest, however, is minimal insofar as Wyoming has no direct interest in the storage water apart from the interests of a particular class of Wyoming water users who have water contracts. By its terms, Wyoming's Fourth Cross-Claim is concerned solely with the Bureau of Reclamation's method of

"allocat[ing] storage water" among Nebraska and Wyoming water users. Third Interim Rep. App. E11. Any change in that allocation would enure to the direct benefit of only those Wyoming water users who have contracted for water. As the Court has explained, a State may assert "'*quasi-sovereign*' interests" in an original action, but "th[at] principle does not go so far as to permit resort to [the Court's] original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy." *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 393-394 (1938).[14]

This Court properly takes into account "practical" considerations in determining whether to entertain an original action. See *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983). Wyoming's doubtful status as an appropriate party to challenge the Bureau's administration of storage water would, as a practical matter, adversely affect the progress of future proceedings before the Special Master, which have already consumed nearly eight years in pretrial litigation. Wyoming's standing to assert the Fourth Cross-Claim would likely become a matter of litigation. Compare *Wyoming* v. *Oklahoma*,

[14] To the extent that Wyoming claims indirect benefits from the use of that water within its borders, its claim would appear even more tenuous than the claim of derivative injury, based on lost tax revenues from decreased private coal sales, that was put forward in *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 798-799 (1992). Three Members of the Court questioned whether that claim of injury provided an appropriate basis for the exercise of original jurisdiction. See *id.* at 812 ("In my view, an entirely derivative injury of the type alleged here—even if it met minimal standing requirements—would not justify the exercise of discretionary original jurisdiction.") (Thomas, J., dissenting).

112 S. Ct. 789, 804-810 (1992) (Scalia, J., dissenting). In addition, the Court would face the question of whether to allow intervention by the numerous water users who are parties to the water contracts at issue, or whether to construe their contractual and legal rights in their absence. It is entirely unnecessary to complicate this proceeding with those questions, because another judicial forum exists to resolve any questions over the Bureau's practices.

C. The Federal District Courts Provide Alternative Fora For Resolving Challenges To The Bureau Of Reclamation's Administration Of Storage Water

This Court exercises its original jurisdiction "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas* v. *New Mexico*, 462 U.S. at 570. It is "incline[d] to a sparing use of [its] original jurisdiction so that [its] increasing duties with the appellate docket will not suffer." *California* v. *Texas*, 457 U.S. 164, 168 (1982) (per curiam). Accordingly, the Court generally will not entertain an original action if another suitable forum is available. See, *e.g.*, *California* v. *Nevada*, 447 U.S. at 133; *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) (per curiam); *United States* v. *Nevada*, 412 U.S. at 538; *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493 (1971).

The federal district courts are appropriate alternative tribunals for litigating claims respecting the Bureau of Reclamation's practices, including its administration of storage water. Those courts possess clear practical advantages as fora for resolution of such claims. The federal district courts in the arid western States are

proximate to the real parties in interest, they typically are well versed in local conditions and the pertinent law, and they are well equipped to undertake the factual inquiries that those suits may entail with minimal expense to the parties. In addition, their decisions are subject to judicial review by the regional courts of appeals and ultimately by this Court.

When this Court crafted the North Platte Decree, it fully understood that the lower federal courts were capable of resolving disputes over specific water allocations under the reclamation laws. See *Nebraska* v. *Wyoming*, 325 U.S. at 612-615 (citing and quoting *Ickes* v. *Fox*, 300 U.S. 82 (1937); *Ide* v. *United States*, 263 U.S. 497 (1924), and other reclamation cases that were initiated in lower courts). Since that time, this Court has routinely considered a broad variety of reclamation issues through judicial actions that were first brought in district court. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988); *Nevada* v. *United States*, 463 U.S. 110 (1983); *California* v. *United States*, 438 U.S. 645 (1978); *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). See also *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958) (on appeal from state court).

There is no reason to exempt the North Platte Basin from the operation of familiar institutions or from recourse to traditional mechanisms for relief. We accordingly submit that challenges to the Bureau's allocation of storage water should be presented to a federal district court. Indeed, the Goshen Irrigation District, a Wyoming water user, has filed a complaint against the United States and the Bureau of Reclamation seeking to enforce its contractual right to storage water under the North Platte Project, raising

arguments that are essentially identical to those that Wyoming presses here. See *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo., complaint filed June 23, 1989). That case is currently under submission, and the parties are awaiting a decision from the district court.

Special Master Olpin's rationale for supplanting the district court is unpersuasive. He suggested that because neither Wyoming nor Nebraska is a party to the *Goshen* litigation, the federal district court "does not have jurisdiction to consider whether any violations that may be proven on the part of the United States will have the effect of undermining the 1945 apportionment." Third Interim Rep. 71. But the fundamental question posed—wherever the claim may be presented—is whether the Bureau has violated any water users' rights. If the court concludes that the Bureau has violated those rights, then it can order the Bureau to provide appropriate relief to cure the violation. And if that court concludes that the Bureau has not violated those rights, then there is no threat to Wyoming's apportionment. In either event, the court must act in a manner consistent with this Court's North Platte Decree, and Wyoming's apportionment will therefore be secure. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (an interstate apportionment "is binding upon the citizens of each State and all water claimants").

Special Master Olpin also suggested that "[t]he situation is comparable to the Court's previous taking of jurisdiction over the Inland Lakes issue even though at the time of Nebraska's initial petition in 1986 a case was pending in Wyoming federal district court in which the Wyoming State Engineer was attempting to litigate the same question against the Bureau of Reclamation."

Third Interim Rep. 71. The Inland Lakes dispute, however, is plainly distinguishable, because that dispute centered on a disagreement between Wyoming and Nebraska over the interpretation of the North Platte Decree itself.[15] By contrast, the storage water dispute does not involve any interpretation, application, or modification of the Decree, which unequivocally states that storage water "shall not be affected." Decree ¶ VI (325 U.S. at 669). Wyoming's allegations rest instead on independent sources of legal rights and duties—"the contracts governing use of water from the federal reservoirs" and "applicable federal and state law." Third Interim Rep. App. E11.[16]

[15] As this Court explained, the fundamental issue was whether "the decree entitles the Bureau to continue its longstanding diversion and storage practices." 113 S. Ct. at 1696. This Court ruled that "[t]he decree did not explicitly establish the Inland Lakes' priority," but "the evidence from the prior litigation supports the conclusion that the Inland Lakes' priority was settled there." *Id.* at 1697.

[16] The Special Master also appeared to suggest that this Court should displace the district court because the United States had raised a sovereign immunity defense in the *Goshen* litigation. Third Interim Rep. 71 n.173. As this Court has recognized, Congress alone may consent to a suit against the United States, and the Executive Branch therefore has an obligation to raise sovereign immunity where there is a legitimate question whether Congress has authorized suit. See *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939). The fact that the United States raised that defense provides no justification for the Court to exercise jurisdiction here. Indeed, a meritorious sovereign immunity defense would bar suit in this Court as well as in district court. *Id.* at 386-387. The sovereign immunity argument raised in the *Goshen* litigation rested on a literal interpretation of the sovereign immunity waiver contained in the reclamation laws, 43 U.S.C. 390uu, which allows joinder of the United States under certain conditions. The United States' interpretation of that provision has

In sum, this Court's North Platte Decree should not disable the federal district courts from resolving issues concerning the federal government's administration of storage water. The contractual disputes at issue here—like the "ownership and title questions" at issue in *California* v. *Nevada*, *supra*—should be resolved in the lower courts, which would normally resolve such claims. See 447 U.S. at 133. Those courts provide a superior forum for resolving complex questions of contract administration with the full participation of the water users, who are the real parties in interest with respect to those claims.

CONCLUSION

The Court should reject the Special Master's recommendation that Wyoming be granted leave to assert its Fourth Cross-Claim.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

NOVEMBER 1994

---

not been followed in subsequent judicial decisions. See, *e.g.*, *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 673-674 (9th Cir. 1993). Those decisions have been brought to the district court's attention in the *Goshen* litigation.

APPENDIX

Donald E. Jones
JONES AND GRAHAM LAW OFFICES
Attorneys for Plaintiff
P.O. Box 848
Torrington, Wyoming 82240
(307) 532-5523

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. C89-0161-J

GOSHEN IRRIGATION DISTRICT, a
Wyoming Irrigation District,
Plaintiff

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION; MANUEL LUJAN, Secretary of the Interior; C. DALE DUVALL, Commissioner of Reclamation, and KENNETH C. RANDOLPH, JR., Acting Project Manager, North Platte River Projects Office, U.S. Bureau of Reclamation,
Defendants

[Filed June 23, 1989]

COMPLAINT

The plaintiff complains against the defendants as follows:

PART I. *GENERAL ALLEGATIONS*

JURISDICTION AND WAIVER OF IMMUNITY

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1346. This suit is brought against the governmental defendants pursuant to waiver of immunity as provided in 43 U.S.C. § 390uu.

PARTIES

2. The plaintiff, Goshen Irrigation District (district), is an irrigation district organized and operating under the laws of the State of Wyoming, with offices in Torrington, Goshen County, Wyoming. The district operates and maintains a diversion dam, canal and laterals for delivery of irrigation water to and in behalf of its landowners. The district is a part of the North Platte project.

3. The defendant United States of America and its agencies, the Department of Interior and Bureau of Reclamation (bureau), administer the North Platte project under the Reclamation Act of 1902, as amended (the "Act"), 43 U.S.C. § 371, et seq. The bureau's offices are in Mills, Wyoming.

4. The defendant Manuel Lujan is Secretary of the Interior charged with the duty to carry out the provisions of the Act pursuant to 43 U.S.C. § 373.

5. The defendant C. Dale Duvall is Commissioner of Reclamation charged with the duty to administer the reclamation under the Act pursuant to 43 U.S.C. § 373(a).

6. The defendant Kenneth C. Randolph, Jr., is Acting Project Manager of the bureau. He directly

administers the collection and release of storage waters within the North Platte project.

PART II. *CAUSE OF ACTION*

7. This is an action by the district against the United States, its agencies and officers to enforce the district's contractual rights to storage water under the North Platte project.

PART III. *ALLEGATIONS COMMON TO CLAIMS*

8. Under the Act the United States constructed storage dams, diversion dams and distribution facilities in the North Platte River and project area, commonly known as the "North Platte project" (project), for reclamation and irrigation of public and private lands, known as "project lands."

9. In 1926, irrigation districts (including this district) were formed to contract with the United States in behalf of landowners' rights and obligations under the project. The United States and this district entered into a written contract in 1926, with subsequent amendments thereto. Copies of the contract provisions controlling this litigation are found in portions of the 1926 contract between the parties, annexed hereto as Exhibit 1, and the 1952 amendatory contract, annexed hereto as Exhibit 2.

10. Under the 1926 contract, this district (as well as the remaining project districts by separate contracts) assumed collection from project landowners to pay the United States for construction costs of the project reservoirs and dams (Pathfinder and Guernsey) and other facilities. The district also agreed to operate and maintain certain project works at its own costs. This district's landowners have fully paid the United States its share of the project construction costs.

11. Under the contracts, the bureau releases and delivers from the reservoirs each district's contractual share of storage water for diversion into its distribution systems to project farms. Delivery is by three main canals (divisions) operated by the district and three similar Nebraska quasi-public districts with approved contractual irrigable acreages, as follows:

North Platte Project Districts & Irrigable Lands

Fort Laramie Division
- Goshen Irrigation District..... 52,483.78 acres
- Gering & Fort Laramie Irrigation District..... 54,845.00 acres

Interstate Division
- Wyoming Lands..... 1,875.00 acres
- Nebraska Nondistrict Lands..... 392.60 acres
- Pathfinder Irrigation District.. 100,556.43 acres

Northport Division
- Northport Irrigation District..... 13,615.00 acres

Total Acres..... 223,767.81

These are the project lands and acreages. See Exhibit 2, Article 1. This district's project lands are supported by adjudicated priority water rights in the project reservoirs with priority date of December 6, 1904.

12. Under its contract, the district is entitled to its pro rata share (project acreage share) of the outlet capacity of the reservoirs (Exhibit 2, Article 13) delivered at Station 12 near the district's diversion point at Whalen Dam in Goshen County (Exhibit 1,

Article 50). This share is limited by the capacity of the district's canal (Exhibit 1, Article 50), or 1500 c.f.s. From this canal the district is entitled to 49% of the canal capacity, or 735 c.f.s, and the Gering & Fort Laramie Irrigation District (canal extension) is entitled to 51% of the capacity, or 765 c.f.s.

13. As of May 2, 1989, the storage available for the project lands was 632,680 acre-feet, of which the district's pro rata share was 148,000 acre-feet. From this storage, the bureau arbitrarily allocated to the district only 93,354 acre-feet, contrary to the contracts.

14. Runoff into storage has augmented the storage water available for delivery to increase the district's storage share, but to date the increase allocated by the bureau to the district is of little consequence to meet its seasonal crop consumption needs.

15. As of June 15, 1989, runoff had increased the district's net contractual storage right by an additional 37,210 acre-feet; however, its canal capacity now limits its storage entitlement to 142,000 acre-feet to meet the remaining 1989 crop needs of its landowners and farmers.

16. Defendants continue, and threaten to continue, to breach the district's contractual rights to project irrigation storage water and refuse to deliver the district's contractual share, as demanded.

17. The bureau's refusal to comply with district contracts has forced the district to unnecessarily conserve and cease use of irrigation water, resulting in continuing harm to crop growth.

18. The district has duly performed all of the conditions on its part to be performed under these contracts with the United States and as required by law.

PART IV. *CLAIMS*

19. Each claim adopts by this reference all allegations contained in this complaint necessary for support of such claim.

Claim 1

[Breach of Contract]

20. The defendants have breached and threaten to continue to breach the district's contractual and legal rights to project storage waters appropriated to its landowners.

Claim 2

[Specific Performance]

21. The district has demanded the defendants comply with existing agreements between the United States and the district and to specifically perform their duties and responsibilities thereunder and deliver to the district its project share of storage waters, which defendants refuse to do.

Claim 3

[Authority of Bureau Officials]

22. The release of the district's storage waters in such reduced amounts in violation of the contract by bureau officials exceeds their statutory and regulatory authority and is null and void.

Claim 4

[Injunction]

23. The landowners of the district have suffered and will continue to suffer substantial crop loss because the district has not received and will not receive its contractual and legal share of project storage water.

24. Defendants threaten to continue to withhold from the district and its farmer-landowners the storage water to which they are entitled, requiring the district and its landowners to suffer extreme hardship and irreparable damage from crop loss.

25. The district has no adequate or speedy remedy at law for the defendants' conduct, above described, and this action for injunction is the district's only means for securing relief before further permanent, irreparable harm occurs.

PART V. *PRAYER FOR RELIEF*

The plaintiff (district) requests this Court to —

1. Issue a temporary restraining order and a preliminary injunction pursuant to Fed. R. Civ. P. 65, ordering the defendant United States of America, and its agencies, officers, employees, successors, and attorneys, and all those in active concert or participation with it or them, to refrain immediately and pending the final hearing and determination of this action from denying plaintiff the contractual share of project storage waters to which it is entitled under the 1926 contract and amendatory contracts thereto, specifically including the 1952 amendatory contract, and with priority as provided by law;
2. Issue a permanent injunction perpetually enjoining and restraining defendant United States of America, and its agencies, officers, employees, successors and attorneys, and all those in active concert or participation with it or them, from the conduct complained of herein;
3. Enforce compliance by the defendants of their contractual obligations owed to the plaintiff,

herein described, and plaintiff's priority rights to storage waters provided as a matter of law;

4. Award to plaintiff its costs and attorney fees; and
5. Award plaintiff such other and further relief as this Court may deem proper.

JONES AND GRAHAM LAW OFFICES
Attorneys for Plaintiff

By /s/ Donald E. Jones
Donald E. Jones
P.O. Box 848
Torrington, Wyoming 82240
(307) 532-5523